

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELUISE PEPION COBELL, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**DEFENDANTS' MOTION FOR ORDER PERMITTING DISCLOSURE OF
INDIVIDUAL INDIAN MONEY ACCOUNT INFORMATION TO CLASS COUNSEL
AND EXTENDING THE COURT'S NOVEMBER 27, 1996
PROTECTIVE ORDER TO PROTECT CONFIDENTIALITY OF THE SAME**

Defendants respectfully move for entry of an order authorizing Defendants to disclose to Plaintiffs documents that contain certain information protected by the Privacy Act of 1974 and providing for the confidential treatment of such information in anticipation of the evidentiary proceeding that the Court has set to commence on October 10, 2007. The grounds for the motion are as follows:

1. In the early stages of this proceeding, the Court entered a Protective Order on November 27, 1996 [Dkt. 15] (copy annexed hereto as Exhibit A). The Protective Order applies expressly to "the First Order of Production, entered contemporaneously herewith [Dkt. 16], or pursuant to any subsequent Order in this action." The Protective Order provides a procedure for designating as Privacy Act Material any material produced under that First Order of Production (or subsequent order) that contains information that "identifies, or is reasonably likely to lead to the identification of, any individual, alive or dead, who currently has, or has ever had, an Individual Indian Money ('IIM') account." Protective Order at 1-2. The Order further provides

for steps for maintaining the confidentiality of such information during this litigation.

2. By its own terms, however, the Protective Order applies only to matter produced pursuant to the First Order of Production and subsequent orders. It does not encompass or permit disclosure of Privacy Act Material in the course of preparing for the upcoming evidentiary hearing.

3. Defendants anticipate that at least two types of forthcoming disclosures will include at least some documents that contain Privacy Act Material; that is, information that is subject to protection from disclosure pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a, and which is not presently subject to the Protective Order of November 27, 1996 or other exception permitting disclosure to Plaintiffs. The first anticipated disclosure would occur on August 31, 2007, which is the date set by the Court in the Scheduling Order (July 11, 2007) [Dkt 3359] for the parties to exchange potential trial exhibits. Interior Defendants also plan to supplement the Administrative Record on the same date. Interior Defendants have determined that part the record supplement, as well as certain potential trial exhibits, which are scheduled to be disclosed on August 31, contain Privacy Act Material as described above. For example, Interior Defendants anticipate disclosing as potential exhibits documents reflecting the reconciliation of individual IIM accounts and/or transaction records relating to the IIM accounts of specific individuals.

4. The second event concerns the discovery request propounded by Plaintiffs on August 8, 2007. See Notice (August 8, 2007) [Dkt 3366] (attaching Plaintiffs' Request for Production Pursuant to Leave Granted at July 9, 2007 Status Conference). In response to a narrow grant of leave by the Court at the July 9, 2007 status conference, Plaintiffs propounded a

discovery request that seeks production of individual account information from the electronic era with respect to 67 named individuals. The response to this document request is due on September 10, 2007. Although Defendants have numerous objections to Plaintiffs' discovery request as propounded, Interior Defendants have identified certain responsive material that the Interior Defendants could produce notwithstanding those objections, except for Privacy Act prohibitions against disclosure. For example, Interior Defendants anticipate producing transaction records for certain individual IIM accounts, except for the statutory proscriptions of the Privacy Act.

5. Interior Defendants have made a good faith determination that certain documents that should be produced as part of the August 31, 2007 exchange of potential trial exhibits, as part of the supplement to the Administrative Record, or as part of the response to Plaintiffs' August 8, 2007 discovery request contain information that Privacy Act Material as defined above. However, the individuals whose personal information is contained in such documents are not named parties in this action, nor have they provided written consent for such information to be provided to Plaintiffs' counsel, see 5 U.S.C. §552a(b), which is a prerequisite to such disclosure absent a court order under 5 U.S.C. § 552a(b)(11).

6. Section 552a(b)(11) of the Privacy Act allows an agency to disclose Privacy Act material without prior written consent "pursuant to the order of a court of competent jurisdiction." Defendants, therefore, respectfully request that the Court enter an order that authorizes said disclosure to Plaintiffs and extends the terms of the Protective Order of November 27, 1996 to all materials produced in connection with the evidentiary hearing set to commence October 10, 2007.

7. Counsel for Defendants consulted Plaintiffs' counsel regarding this motion and Plaintiffs' counsel stated that they have no objection to the documents being included within the scope of the November 27, 1996 Protective Order. Plaintiffs do not believe, however, that it is necessary to extend the scope of the Protective Order because of the Court's July 11, 2007 Scheduling Order [Dkt 3359], pursuant to which, Plaintiffs believe, these documents can be produced.

Conclusion

For the foregoing reasons, Defendants' motion should be granted.

Dated: August 24, 2007

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
MICHAEL F. HERTZ
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ Robert E. Kirschman, Jr.
ROBERT E. KIRSCHMAN, JR.
Deputy Director
D.C. Bar No. 406635
MICHAEL J. QUINN
Trial Attorney
D.C. Bar No. 401376
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Telephone: (202) 616-0328
Facsimile: (202) 514-9163

CERTIFICATE OF SERVICE

I hereby certify that, on August 24, 2007 the foregoing *Defendants' Motion for Order Permitting Disclosure of Individual Indian Money Account Information to Class Counsel and Extending the Court's November 27, 1996 Protective Order to Protect Confidentiality of the Same* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston